STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B047

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PETER E. BLEIDT,

Complainant,

vs.

COLORADO SCHOOL OF MINES,
BOARD OF TRUSTEES OF THE COLORADO SCHOOL OF MINES,
DEPARTMENT OF HIGHER EDUCATION,

Respondent.

The hearing in this matter was convened before Administrative Law Judge (ALJ) Margot W. Jones on March 13, 1997, and concluded on April 24, 1997, with entry of an order granting respondent's April 22, 1997, request to submit additional authority. Complainant, Peter E. Bleidt (Bleidt or complainant), was present at the hearing and represented by Darold W. Killmer, Attorney at Law. Respondent appeared at hearing through William E. Thro, Assistant Attorney General.

Complainant tesitifed in his own behalf and called the following witnesses to testify at hearing: John Chrisman; Gail Bleidt; and Debbie Paige Lane. Respondent called the following witnesses to testify at hearing: Robert Francisco; Laurie Benallo; and Debbie Paige Lane.

The parties stipulated the the admission of exhibits 1 through 9, B, and C. Complainant's exhibits A and D were admitted into evidence without objection. Complainant's exhibit E was admitted into evidence over objection.

MATTER APPEALED

Complainant appeals the termination of his employment under Rule, R7-2-5. Complainant alleges that the termination of his employment violated the American With Disabilities Act (ADA), 42 U.S.C. sections 12101, et. seq.

ISSUES

1. Whether respondent's action was arbitrary, capricious or

contrary to rule or law;

2. Whether complainant was discriminated against on the basis of having a disability;

3. Whether complainant is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

1. As a preliminary matter at hearing, respondent challenged complainant's assertion that he was temrinated from employment for cause. Respondent maintained that complainant's termination was an administrative action taken under State Personnel Board Rule, R7-2-5. Complainant conceded that his challenge of the the agency's action was not based on a claim that he was terminated for cause.

2. Complainant withdrew his claim brought under the "Rehabilitation Act of 1973".

STIPULATIONS OF FACT

1. Complainant, Peter Bleidt, was not terminated for performance reasons.

2. On October 4, 1996, complainant had an impairment which substantially limited him in a major life activity.

3. The parties stipulated to the admission into evidence of the position descriptions for any vacant positions which were open at the Colorado School of Mines on October 4, 1996.[1]

[1]The parties entered into this stipulation with the understanding that neither party had available at hearing the position descriptions for the vacant positions for which complainant was qualified at the Colorado School of Mines on October 4, 1996. Complainant maintained that he requested the documents through informal discovery and respondent did not provide them. Complainant did not attempt to obtain the documents through formal discovery. During testimony, Debbie Paige Lane testfied about the vacant positions at the Colorado School of Mines on October 4, 1996, but complainant took no further action to obtain the job descriptions or to have the ALJ take

FINDINGS OF FACT

1. Complainant Peter Bleidt was employed by the Colorado School of Mines (CSM) in 1989 as a maintenance mechanic I. Bleidt was certified in his position in October, 1992. He remained employed in this job classification until October 4, 1996, when his employment was terminated under the provision of Rule R7-2-5. As a maintenance mechanic I, Bleidt worked under the supervision of Robert Francisco. Francisco was the appointing authority for Bleidt's position.

2. As a maintenance mechanic I, Bleidt was responsible for a variety of duties. He was responsible for making every repair in student and family housing units on the CSM campus. Bleidt was responsible for plumbing repairs, electrical repairs, roofing, welding, and kitchen renovations, including replacing glass, laying linoleum, and installing sinks and countertops. His duties required him to bend stoop, carry, lift, push and pull. His duties required him to perform repetitive motion with both of his hands, turning a screw driver, hammering nails, and squeezing pliers. Bleidt was assisted in the performance of his duties by a maintenance helper and durig the summer month two or three temporary employees assisted him.

3. Bleidt's position was funded through revenues received by CSM from students renting the units maintained by Bleidt.

4. Bleidt's job performance throughout his employment at CSM was acceptable. He was viewed as a valuable and competent employee.

5. On April 22, 1996, Bleidt was placed on injury leave for carpel tunnel syndrome. Bleidt remained off work exhausting all available leave until October 1, 1996. On October 4, 1996, Bleidt was unable to perform the essential functions of his job with or without reasonable accommodation.

6. Bleidt's physical difficulties began in December, 1993, when he began to experience the early symptoms of carpel tunnel syndrome. His hands fell asleep and became numb. His hands ached. He frequently dropped items that he was holding. He experience difficulty lifting with his hands and had to use only his arms. Bleidt's difficulties with carpel tunnel became progressively worse

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administrative notice of the job descriptions.

until April, 1996, when he left work.

7. Bleidt underwent surgery to correct the problems with his hands. On July 22, 1996, Bleidt had surgery on his left hand. As of March, 1997, Bleidt had not experienced significant improvement in his left hand as a result of the surgery. In October, 1996, Bleidt also underwent surgery on his right hand to correct carpel tunnel.

8.

DISCUSSION

In this appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. Complainant also bears the burden to prove that she was discriminated against on the basis of disability.

The Americans With Disabilities Act (ADA) requires state and local governmental entities to make all programs, services and employment accessible to disabled persons. The Act defines a person with a disability as: 1) a person with a physical or mental impairment that substantially limits a major life activity; 2) a person with a record of such physical or mental impairment; or 3) a person who is regarded as having such an impairment. 42 U.S.C. § 12102(2). "Substantially limits" means that a person is unable to perform, or is significantly restricted in performing, a major life activity that an average person can perform. 29 C.F.R. 1630.3(j)(1).

The ADA prohibits discrimination against "qualified individuals with disabilities." Employees are qualified for protection if they: 1) satisfy the prerequisites of the position by possessing the appropriate education, employment experience, skills, licenses and the like; and 2) they can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. 1630.2(m). The determination regarding the employee's qualifications should be based on the persons's capabilities at the time the employment decision is made. See: Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991).

Employers must provide reasonable accommodation to qualified

individuals with a disability. 29 C.F.R. 1630.9. Reasonable accommodation is a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. 1630.2(o). Employers are obligated to make reasonable accommodation only to employees with known disabilities. Id. The disabled individual must inform the employer that an accommodation is necessary, unless such is obvious, and the employer may require documentation of the need for an accommodation. Id. Employers need not eliminate or reallocate essential job functions. Id. Employers need only provide an accommodation which enables the employee to perform the essential duties of the job, not necessarily the accommodation of the employee's choice. 29 C.F.R. 1630.9(d).

Complainant's initial burden is to establish a prima facie case of discrimination by showing by a preponderance of the evidence: 1) that she belongs to the protected class (person with a disability); 2) that she was otherwise qualified to perform the duties of the position; and 3) that an adverse action was taken against her because of the disability. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once complainant meets her initial burden, respondent must rebut the presumption of discrimination by setting forth nondiscriminatory justifications for the allegedly discriminatory practice. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Then, complainant is afforded the opportunity to show by preponderant evidence that respondent's asserted business reason is a mere pretext for unlawful discrimination. McDonnell Douglas, supra. Ultimately, complainant must prove that respondent's action was the result of intentional discrimination. St. Mary's Honor Center, et al. v. Hicks, 509 U.S. ____, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

In the present matter, complainant did not establish that she is a person with a disability under the ADA. While she has a record of a knee injury dating to July 1993, she did not establish that this injury rises to the level of an impairment substantially limiting a major life activity. The agency never regarded Scrip as a disabled person. Complainant was perceived as a person with an injury, not a person with a disability.

There is a difference between "impairment" and "disability." Impairment is a medical term. Disability explains a legal conclusion. An impairment is not considered a disability unless it is severe enough to cause a substantial limitation on a major life activity, including caring for oneself, walking, seeing, hearing,

speaking, breathing, learning and working. A person is substantially limited if she cannot perform, or is limited in her ability to perform, a major life activity. An employer's concern is whether the employee is substantially limited as to the major life activity of working. Complainant did not produce sufficient evidence to show this to be the case. See Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), cert. denied, 115 S.Ct. 1104 (1995). Complainant also failed to prove that respondent intentionally discriminated against her on the basis of a disability. St. Mary's Honor Center, supra.

A person who has a disability under workers' compensation law does not necessarily have a disability under the ADA. Nor does the filing of a workers' compensation claim necessarily constitute a record of a disability. An employee with an occupational injury is not automatically regarded as having a disability.

The employer, not the employee, bears the ultimate responsibility for deciding when the employee is ready to return to work. In this context, respondent rightly relied upon medical advice over contrary statements by complainant. The decision makers might be accused of being overly cautious, but the evidence suggests that they were attempting to act in the best interest of the employee by assuring that her work restrictions were clear and understandable in order to avoid violating the restrictions or aggravating the injury. It is undisputed that Scrip was, and is, a valuable employee. The expectation always was that she would return to full duty, perhaps as early as January 1995.

The fact that an injury or condition can be reasonably accommodated does not lead to the conclusion that an individual is entitled to prevail under the ADA. A physical impairment, by itself, is not necessarily a disability as contemplated by the ADA. Dutcher v. Ingalls Shipbuilding, 53 F.3rd 723 (5th Cir. 1995); Patrick v. Southern Co. Serv., 910 F. Supp. 566 (N.D. Ala. 1996). An employer is not required to provide a reasonable accommodation for an employee injured on the job unless the employee has a disability pursuant to the ADA.

All of respondent's witnesses testified that they did not regard complainant as having a disability, but rather they were trying to accommodate a work-related injury.

CONCLUSIONS OF LAW

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of June, 1997, at Denver, Colorado.

_____
Margot W. Jones
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and

mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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